Supreme Court, U.S.
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No. 91-2053

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STACIA LEE SUMWALT AND
DAVID RANDALL JENKINS,

Petitioners,

v.

FRED T. BOICE, in his official capacity as trustee in bankruptcy, EQUITY SECURITIES-HOLDERS' COMMITTEE, UNIVERSITY OF ARIZONA, and HYDRO GEO CHEM, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT FRED T. BOICE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Petitioners' appeal of a Bankruptcy Court order authorizing the sale of Jenkins' University of Arizona football and basketball tickets properly dismissed as moot by the District Court and Court of Appeals pursuant to 11 U.S.C. §363(m) where Petitioners failed to obtain a stay of the order pending appeal?

LIST OF PARTIES

Contrary to the List of Parties in the Petition, Stacia Lee Sumwalt never requested, nor was granted, leave to intervene below, and Hydro Geo Chem, Inc. was not a party below, nor did it make any appearance below.

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Respondent, Fred T. Boice, in his official capacity as trustee in bankruptcy (the "Trustee"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's Memorandum Decision and its order denying rehearing in this case.

JURISDICTION

Petitioners did not file a Notice of Appeal within 10 days of the Bankruptcy Court's Minute Entry Order of September 6, 1990 which granted the Trustee's motion to assume the executory contract for the tickets and to sell them at public auction. *See* Bkrtcy. Rule 8002(a). As noted in the Petition, the Bankruptcy Judge considered the September 6 order to be a final order. Petition, p. 5. A failure to timely appeal deprives the appellate courts of jurisdiction to hear the appeal. *United States v. Robinson*, 361 U.S. 220, 224 (1960); *In re Slimick*, 928 F.2d 304 (9th Cir. 1990) (absence of findings and conclusions does not prevent an order from becoming final, and appellant bears burden of seeking clarification of ambiguous appeal deadline).

Furthermore, contrary to the statement in the Petition (p. 2), Sumwalt, who is neither a debtor or creditor in this bankruptcy, never sought leave to intervene in the proceedings below, although she spontaneously made several filings. Over the Trustee's objection, the Bankruptcy Judge "assumed," without deciding, that she had standing to appear in the bankruptcy proceedings.[1]

Because the District Court and Ninth Circuit appeals were dismissed as moot, neither of those courts ruled upon the jurisdiction or standing issues, which would need to be decided by this Court.

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[1] The reprint in the Petition of the Bankruptcy Court's Minute Entry Order dated September 17, 1990 is in error. In the Petition, the Order reads, ". . . assuming *arguendo* Sumwalt does not have standing . . . ." Petition, p. A-10. The Order actually states, ". . . assuming *arguendo* Sumwalt does have standing . . . ."

STATEMENT OF THE CASE

Jenkins filed for Chapter 11 bankruptcy relief on September 24, 1987. His case has been jointly administered with the Chapter 11 cases filed by 44 limited partnerships and a corporation controlled by Jenkins known as The JNC Companies ("JNC"). Respondent Fred T. Boice has served as the trustee for all these cases.

At the time Jenkins made his Chapter 11 filing, he held an interest in an executory contact to use and renew two college football and basketball tickets. This case involves the disposition of that interest in Jenkins' bankruptcy proceeding.

Upon motion of the Trustee, the Bankruptcy Court, by Minute Entry Order of September 6, 1990, authorized the sale of the tickets pursuant to 11 U.S.C. §363. The date (October 27, 1990) and the procedures for the sale were established by a Minute Entry Order dated October 11, 1990. Jenkins filed a Notice of Appeal from those orders on October 19, 1990. Sumwalt, who had made several unauthorized filings in these proceedings before the Bankruptcy Court, filed her Notice of Appeal on October 22, 1990.

Neither Jenkins nor Sumwalt requested the Bankruptcy Court to issue a stay of these orders pending appeal. *See* Bkrtcy. Rule 8005.[2] Nor did they request that the District Court expedite the appeal on an emergency basis, as is not

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[2] In an effort to stop the sale, on September 12, 1990, prior to any appeal, Sumwalt filed in the District Court a Petition for Writ of Prohibition And/Or Writ of Mandamus And/Or Other Extraordinary Relief, as well as an Ex Parte Application for Interlocutory Stay of Proceedings pending a determination of the Petition. Both the Petition and Application were denied.

uncommon in bankruptcy practice. Instead, they each filed a request for interlocutory stay pending appeal with the District Court. Those requests were denied on October 24, 1990. That same day, Jenkins and Sumwalt filed an Emergency Petition for Writ of Mandamus with the Ninth Circuit seeking various forms of relief to block the sale of the tickets, including an interlocutory stay pending appeal. On October 27, 1990, the Ninth Circuit denied the Emergency Petition and request for interlocutory stay. As scheduled, the tickets were sold at public auction on October 27, 1990 to a good faith purchaser, Hydro Geo Chem, Inc., and the Bankruptcy Court entered an order confirming the sale.

The Trustee moved to dismiss the District Court appeal on mootness grounds pursuant to 11 U.S.C. §363(m). That motion was granted on January 3, 1991 and the appeal dismissed. Jenkins and Sumwalt then appealed to the Ninth Circuit, which entered its Memorandum Decision dismissing the appeal on March 2, 1992. A Petition for Rehearing was denied on April 1, 1992.

REASONS FOR DENYING THE WRIT

I. PROCEDURAL INFIRMITIES DICTATE THAT THE WRIT BE DENIED.

A. Petitioners failed to timely appeal from the September 6 Order authorizing the sale of the tickets as required by Bankruptcy Rule 8002(a). In an apparent attempt to cure this defect, Petitioners alleged in their original Notices of Appeal from Bankruptcy Court to the District Court "that the [Bankruptcy] Court's September 6, 1990 Minute Entry Order was interlocutory . . . ."[3] However, before the Ninth Circuit, Petitioners affirmatively asserted that the September 6 Order (as well as the September 17, October 11 and October 27 Orders) was "final and appealable to the District Court pursuant to 28 U.S.C. §158(a)." In either event, Bankruptcy Rules 8001(a) and (b), in conjunction with Rule 8002(a), require that a Notice of Appeal be filed within 10 days. Failure to do so jurisdictionally bars the appeal.

B. Petitioners ask this Court to determine what Congress intended in enacting the mootness rule of 11 U.S.C. §363(m). However, they did not make the same request of any of the courts below. Since this issue of congressional intent was neither raised before, nor discussed by, the courts below, this Court should not entertain the question. *See Youakim v. Miller,* 425 U.S. 231, 234 (1976).

C. The Petition for Certiorari requests a remand directing the Bankruptcy Court "to grant Petitioners the right to renew the athletic event tickets . . . ." Petition, p. 20. In order to accomplish that, the tickets would have to be taken

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[3] To the extent Petitioners believed the Order was interlocutory, they did not file a motion for leave to appeal as required by Bankruptcy Rule 8001(b).

away from the successful bidder at auction, Hydro Geo Chem. However, Petitioners never joined Hydro Geo Chem in any proceeding in the Bankruptcy Court, never asserted any claim against it, and did not include Hydro Geo Chem in the Notice of Appeal to the District Court. *See In re Royal Properties, Inc.,* 621 F.2d 984, 987 (9th Cir. 1980) (appeal properly dismissed where appellant failed to obtain a stay prior to sale and purchaser was not a party to the appeal).

Belatedly recognizing this fatal omission, Jenkins and Sumwalt adopted the novel approach of moving to join Hydro Geo Chem as an "indispensable party" *on appeal* before the District Court, even though there is no authority for such procedure in either the Bankruptcy Rules regarding appeals or the Federal Rules of Appellate Procedure. That motion was denied as moot when the District Court dismissed the appeal.

Hydro Geo Chem has never been made a party to any of these proceedings nor has it ever made an appearance. As Jenkins and Sumwalt acknowledged before the District Court, "Appellants [Petitioners] cannot obtain effective relief" without the joinder of Hydro Geo Chem.[4]

Before the Ninth Circuit, Petitioners contended that Hydro Geo Chem had received "effective notice" of the appeal. However, not only has no such factual finding ever been made, but notice of an action does not equate with being a party to an action. Since no effective relief can be

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[4] In an effort to salvage their appeal, Jenkins and Sumwalt suggested to the Ninth Circuit that, in lieu of the tickets themselves, they could be awarded the monies received by the Trustee for the tickets. Assuming, *arguendo*, that that might have been a viable alternative (if their appeal had not been moot), the request, made for the first time in the Court of Appeals, came too late.

granted to Petitioners, Supreme Court review would be inappropriate. *See Mills v. Green*, 159 U.S. 651 (1895).

D. In addition to the mootness issue, Petitioners request the Court to rule on the merits of the "disqualification" and "property of the estate" issues. However, neither the District Court on appeal, nor the Ninth Circuit, reached the merits of those issues. This Court should also decline to do so. *See Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32, 37 n.5 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 54 (1991).

II. THIS IS NOT A "SPECIAL" CASE WHICH IS WORTHY OF SUPREME COURT REVIEW.

There are no "special and important reasons" which would indicate that this Court should grant the Petition. The Ninth Circuit's decision does not conflict with other circuit court decisions, nor with any applicable decision of this Court. Moreover, the Memorandum Decision does not deal with an important question of Federal law which requires review by this Court. While Petitioners have made every effort to clothe this dispute in Constitutional dress in order to justify their Herculean efforts before four different courts, in reality those efforts merely expose an unshakable obsession with these tickets and Petitioners' inability to deal with having to sit elsewhere.

A. Jenkins and Sumwalt argue that 11 U.S.C. §363(m) does not apply to this case because of their contention that the tickets were not property of the bankruptcy estate. However, Petitioners acknowledged before the Court of Appeals that there is no conflict among the circuits on this issue:

> At the outset, this Court must recognize other Courts of Appeals have held that in the absence

> of a stay pending review, 11 U.S.C. §363(m) is a bar to the exercise of appellate jurisdiction in all cases, even where the sale of property involved a sale of property that did not belong to the bankruptcy estate.

Appellants' Opening Brief, pp. 13-14, citing *In re Sax*, 796 F.2d 994 (7th Cir. 1986); *In re Stadium Management Corp.*, 895 F.2d 845 (1st Cir. 1990); and *In the Matter of Gilchrist*, 891 F.2d 559 (5th Cir. 1990). Although Petitioners now assert that the Memorandum Decision conflicts with prior Ninth Circuit decisions, they admitted below that this case does not fall within any of the very narrow exceptions to the §363(m) mootness rule recognized by the Ninth Circuit. Moreover, to the extent they actually believed there was such a conflict, they did not make a suggestion for rehearing *en banc*. *See* Rule 35, Fed. R. App. P., Ninth Circuit R. 35-1.

B. Petitioners also claim that they did not have an adequate hearing before the Bankruptcy Court because the Bankruptcy Judge allegedly was biased and prejudiced and should have disqualified himself.[5] According to Petitioners, the "bias and prejudice" is evidenced by (1) the judge's comment that "I don't think a bankrupt ought to be sitting in the first row of the basketball arena when the tickets are going for $5000 a pop," and (2) the judge's participation in the "scheme" against JNC in which the judge authorized the Trustee to enter a *nolo contendere* plea for JNC on one misdemeanor count in a state court criminal proceeding.[6]

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[5] The District Court described the allegations of bias and prejudice as "wholly without merit and bordering on the scandalous."

[6] Petitioners and JNC have alleged the existence of a number of schemes and conspiracies against them in relation to these proceedings. (continued...)

Incredibly, Petitioners assert that the Bankruptcy Judge's comment about the tickets indicates that he is socially prejudiced against bankruptcy debtors because he allegedly believes that they are not worthy to sit in particular locations at collegiate sporting events. To the contrary, the judge was merely expressing a legitimate concern that in liquidating the bankruptcy estate, the Trustee should not overlook any valuable asset. However, if one accepts the Petitioners' analysis that this comment evidences prejudice toward bankrupts, then this judge would be disqualified from hearing any case in bankruptcy.

With respect to the bankruptcy court's authorization to permit the Trustee to enter a *nolo contendere* plea on behalf of JNC, the most that can be said is that that may have been an erroneous legal ruling which was remedied by the Arizona Court of Appeals when it decided that JNC had a right to counsel of its own choosing. Petition, p. C-1. Petitioners' theory would require that every judge who makes an erroneous legal ruling be disqualified for bias and prejudice.

Furthermore, while 28 U.S.C. §144 and 28 U.S.C. §455 differ procedurally, in order to disqualify a judge pursuant to either section, the alleged bias or prejudice must result from an extra-judicial source. *United States v. Olander*, 584 F.2d 876, 882 (9th Cir. 1978), *vacated on other grounds*, *Harrington v. United States*, 443 U.S. 914 (1979);

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[6](...continued)
According to various filings made by the Petitioners, the co-conspirators have included, *inter alia*, the bankruptcy judge, the Trustee, the Trustee's counsel, the Trustee's accountants, Admiral Insurance Company (one of the creditors), W.R. Berkley Corporation (Admiral's parent company), numerous officers and directors of Berkley, Admiral's counsel, the Pima County (Arizona) Attorney and at least two of his deputies, Pima County itself, each of the members of the Pima County Board of Supervisors, and all of the sitting judges on the Pima County Superior Court.

United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986); *Pau v. Yosemite Park and Curry Co.*, 928 F.2d 880 (9th Cir. 1991). No extra-judicial source exists in the present case since the allegedly objectionable conduct occurred strictly in the course of the Bankruptcy Judge's administration of the pending bankruptcy proceedings.

Petitioners' contention below that an extra-judicial source of bias and prejudice is no longer required for recusal is based upon a misreading of *United States v. Van Griffin*, 874 F.2d 634 (9th Cir. 1989). In *Van Griffin*, the Ninth Circuit held that a magistrate was disqualified under §455(a) because of his possession of an *ex parte* communication. The *Van Griffin* court did not address whether it deemed the source of the bias to be extra-judicial; yet, by its very nature, an *ex parte* communication is outside of the judicial process. Moreover, the recent decision in *Pau v. Yosemite Park and Curry Co.*, *supra*, confirms that disqualification under §455(a) is required "only if the bias or prejudice stems from an extra-judicial source and not from conduct or rulings made during the course of the proceedings." *Id.* at 885.

C. Finally, Petitioners' contention below that the policies underlying the Fifth Amendment "outweigh" the policies underlying §363(m) is based on the incorrect assumption that the two provisions are mutually exclusive. In this case, the Bankruptcy Court provided ample notice and an opportunity to be heard on the Trustee's motion to assume and assign the executory contract for the tickets. As discussed above, Petitioners also sought relief, in the form of requests for Writs of Mandamus and interlocutory stays, from both the District Court and the Ninth Circuit. In connection with those applications, Petitioners extensively briefed both the disqualification and property of the estate issues. Yet, they were unable to convince even one of the five judges to whom these arguments were presented that their position had sufficient merit to even warrant a stay pending appeal.

The Due Process clause does not "confer 'a right to interminably litigate [an] issue.'" *In re Citizens Mortgage Investment Trust*, 25 B.R. 1005, 1008 (D. Mass. 1982) (quoting *Clarkson Construction Co. v. Occupational Safety and Health Review Commission*, 531 F.2d 451, 456 (10th Cir. 1976)). The application of 11 U.S.C. §363(m) in this case will not deprive Petitioners of property without due process, but will simply bring this dispute to a well-deserved end.

CONCLUSION

For the foregoing reasons, this Court should decline to review this case by writ of certiorari.

Respectfully submitted,

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